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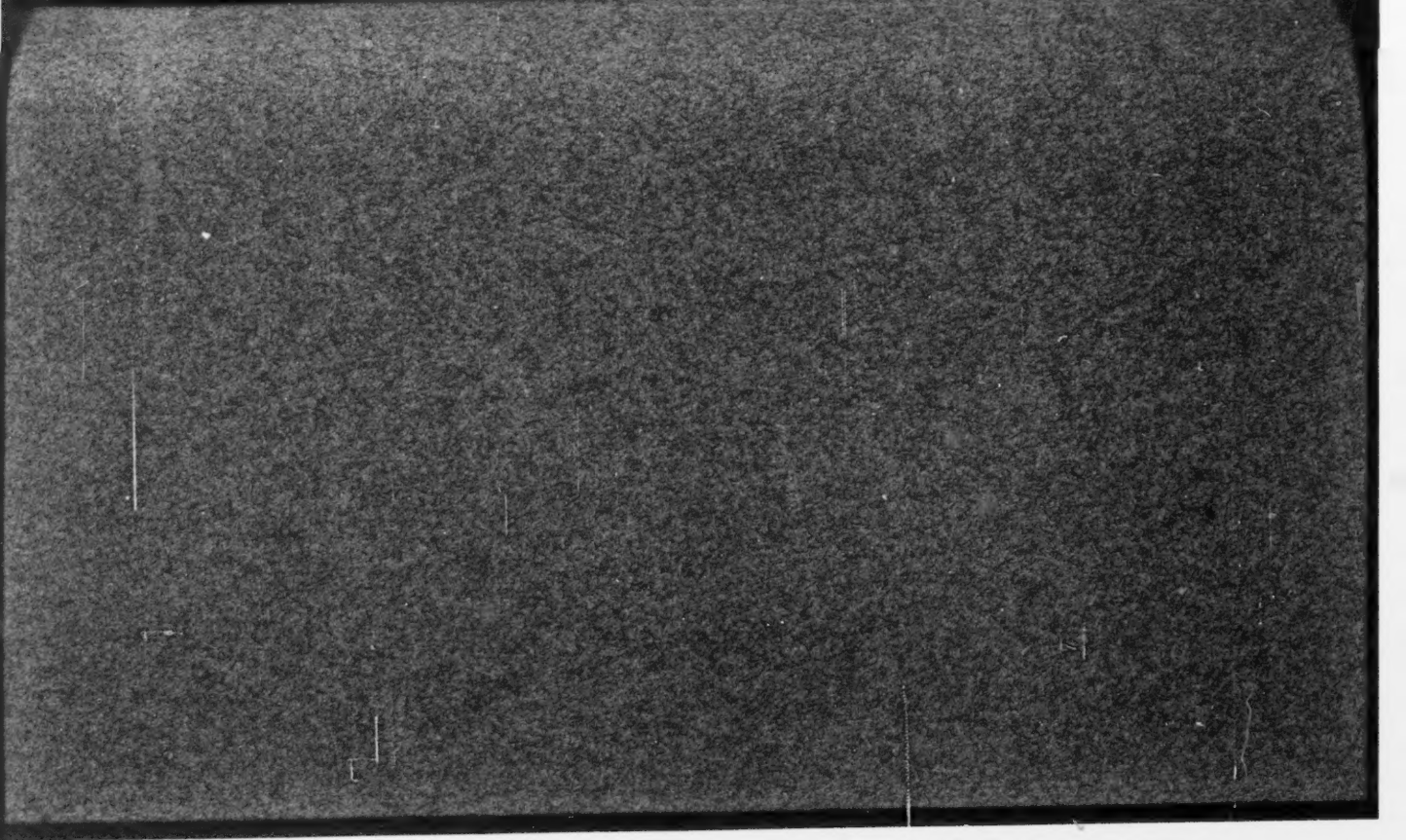
In the Supreme Court of the United States

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. — No. 149.

WERNHER, BARNES & Co., LIMITED, APPELLANT,
v.
THE UNITED STATES. — No. 466.

REPLY BRIEF ON PETITION FOR REHEARING.



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The opposing briefs refrain from discussing the point about protest, on the ground that it is outside the order of the court and that it has nothing to do with the power to ratify. We are well satisfied to leave that matter as it now stands. It is manifest, as we have said, that since our adversaries claim a vested right, which affects the power to ratify, the failure to protest is an essential factor in that question and is therefore fairly open to discussion.

Notwithstanding their self-denying ordinance, however, counsel freely discuss again the intention of the Executive, which is no more closely connected with the inquiry as defined by the court than the failure to protest.

We submit that the strength of the argument in favor of the *power* of Congress to ratify is not weakened by the briefs filed for claimants. We think also that our argument on the intention of Congress rests established, unshaken by our opponents; but a few more suggestions on both points will be appropriate.

It is impossible to concede that the *President's intention* in the original order of July, 1898, is to be resolved into a mere feat of verbal construction. The will of the Executive can not be thus separated from the document, and the will that made the document be nullified by a gloss of its language. We do not mean that the will must prevail; we are not looking back to the war power in the least. What we mean is that the Executive will and meaning as it existed before and after the treaty of peace must be construed by the executive acts as well as words. Now, there can be no doubt what the Executive thought its own words meant, and there can be no doubt that the Executive before and after the treaty was ratified collected duties on goods entering the Philippines at Manila and elsewhere from the United States as from foreign countries, believing that it had the power to do so, and that the intention to do so was well expressed in the order and its amendments.

We remind the court that among other orders after the treaty ratification, General Orders No. 49 of the military governor, dated *October 23, 1899*, revised and promulgated again *in integro* the tariff and regulations as promulgated October 26, 1898, which contained provisions regarding manifests expressly applying to vessels and cargoes from the United States, and provided that all supplies and materials for the use of the Army and Navy of the United States should be admitted free of duty, i. e., providing that other merchandise from the United States should be taxed, as was notoriously done.

The meaning of this is clear, and the inference as to purpose irresistible. We submit that, tested by the language itself and by the meaning and purpose of words as shown by acts, it is impossible to question the intention of the Executive in the original order as it was continued, although, of course, the court has now adjudged that the Executive carried out that intention without authority. It is true that, looking at the order at the start and from the point of view of a scholiast criticism, the Executive did not *foresee* on July 12, 1898, that the war with Spain would end in less than a year, and that there would be a domestic insurrection, and that, believing in the validity of his war power, he would have occasion to continue, enlarge, and amend the terms and effect of his order; but this fact does not affect the *intention* of the Executive as shown in the evolution of these transactions.

The opposing argument applies this same sort of subtle distinction and refinement to the language of the act of July 1, 1902. They say that the clauses, "action * * * taken by virtue of the authority * * * as Commander in Chief * * * as set forth in his order * * * together with the subsequent amendments of said order," and, "the actions of the authorities * * * taken in accordance with the provisions of said order and subsequent amendments," must mean action falling strictly within the limits of the war power as now determined by this court; that otherwise, since the court has determined that tariff collections after April 11, 1899, were not authorized by the order, Congress would be ratifying not what was in accordance with the order, but what was disaccordant, which is inconsistent with its own words.

Let us scrutinize this notion of the terms of section 2.

At the time this act was passed Congress knew that the executive authority in the Philippine situation was doubtful, because the *Diamond Rings* case had decided that duties could not be levied here on merchandise coming from the Philippines. But Congress did not know until the present case was decided last spring that the war authority of the Executive throughout the whole Philippine situation (in the tariff field), after the treaty ratification, was not only doubtful, but was entirely without foundation. Can any reasonable man suppose that, because of the language quoted from section 2 of the act, Congress meant carefully to delimit and separate

the authorized from the unauthorized action of the Executive; that Congress meant to say: "We ratify the action taken by the Executive respecting the Philippine tariff only so far as it now appears to be, or may hereafter turn out to be, valid and constitutional without any ratification from us;" that Congress meant to say "We ratify what you did, so far as the Supreme Court determines you had a right to do it"?

The action of the President was taken by virtue of his authority as Commander in Chief. That is to say, what he did was *initiated* by an order which was valid by virtue of such authority when he promulgated it and for some time thereafter. The actions of his subordinate authorities were taken in accordance with the provisions of said order and subsequent amendments in the same sense. The words "subsequent amendments" present destructive criticism to our opponents, as we have pointed out, and notwithstanding their dialectics, for no distinction is intimated between subsequent amendments before and after April 11, 1899, and every amendment drew forward and continued the whole scheme to its date. The claimants' argument seeks to have the court regard the case as if, with the first amendment after the ratification of the treaty or with some subsequent amendment, the President had said: "This tariff order with its amendments heretofore prescribed shall cease hereafter to apply to vessels or merchandise arriving from the United States."

Congress, in section 2 of the act of July 1, 1902, was concerned merely to identify, as preliminary to its

confirmation, in due legislative form, the subject-matter of the enactment, viz, the tariff set forth and established by said order and the origin of its imposition by virtue of the authority of the Commander in Chief. Similarly, in the later portion of the section Congress approves the actions of the authorities, and to specify *what* actions, so as to limit the confirmation to that particular field, viz, of the tariff, defines the actions as taken in accordance with the provisions of the said order, which is merely a more formal way of saying taken *under* or *in pursuance of* said order. Congress meant, and said in effect, "the action taken by the President, as Commander in Chief"—the longer expression is mere formality and artificiality of language. Congress certainly did not mean to say, "action only so far as taken by virtue of valid constitutional authority," or "if the action taken was not by virtue of authority, then we do not confirm." We think it is manifest that Congress said, in effect: "What the Executive did under its provisional tariff, in pursuance of constitutional authority, as was supposed, is hereby approved."

The Executive was endeavoring in good faith to perform a duty imposed upon him by the law, public and municipal. He went beyond the strict line of his legal power and authority in performing such duty. Did Congress mean to approve what was plainly within the strict line or what exceeded?

In short, two views alone are possible—one, that Congress meant only to approve what the Executive

should be judicially determined to be empowered to do under the constitutional grant and to administer a rebuke respecting authority exercised outside or beyond the limit thus judicially defined; the other, that Congress, knowing what the Executive acts were and what the doubts as to his power, meant to approve broadly, as we contend; intending actions originated by the order and taken under it to be confirmed even if it turned out that for part of the time the actions were not "by *virtue* of the authority" of the war power or "in *accordance* with the provisions of said order and subsequent amendments," as now technically construed; intending this excess of authority, honestly assumed for legitimate purposes, to be ratified even if that authority was exercised (strictly speaking) by color of rather than by virtue of the constitutional power. We can not think it doubtful which of these two views of the real intention of Congress is sound and should prevail.

WM. H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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